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16 **UNITED STATES DISTRICT COURT**  
17 **CENTRAL DISTRICT OF CALIFORNIA**  
18 **WESTERN DIVISION**

19 SWEET PEOPLE APPAREL, INC.  
20 d/b/a MISS ME, et al.,

21 Plaintiffs,

22 v.

23 PHOENIX FIBERS, INC., et al.,

24 Defendants.

Case No.: 2:16-cv-00940-TJH-JC

Hon. Terry J. Hatter Jr.

**PLAINTIFFS' NOTICE OF  
MOTION AND MOTION TO  
STRIKE PHOENIX FIBERS,  
INC.'S ANSWER TO  
PLAINTIFFS' FIRST  
AMENDED COMPLAINT**

Date: April 24, 2017

Time: UNDER SUBMISSION

Courtroom: 9B

Case Filed: February 10, 2016

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on April 24, 2017, or as soon thereafter as the  
3 matter may be taken under submission by the Honorable Terry J. Hatter Jr., located at  
4 350 W. 1st Street, Courtroom #9B, 9th Floor, Los Angeles, California 90012,  
5 plaintiffs Sweet People Apparel, Inc. d/b/a Miss Me, and RCRV, Inc. d/b/a Rock  
6 Revival (collectively “Plaintiffs”) will and hereby do move the Court for an order  
7 striking defendant Phoenix Fiber, Inc.’s (“Phoenix Fibers”) Answer to Plaintiffs’ First  
8 Amended Complaint (the “FAC”). *See* Dkt. No. 105.

9 This motion is made on the grounds that the Answer was filed on an untimely  
10 basis, and to allow it to stand would be highly prejudicial. Plaintiffs filed and served  
11 their FAC on **May 18, 2016**. Dkt. No. 32. Over the next ten months, Phoenix Fibers  
12 actively participated in all manner of discovery and motion practice, but neglected to  
13 file an Answer to the FAC within the 14-day statutory response period. Rather,  
14 Phoenix Fibers waited until two weeks ago — **289 days** after Plaintiffs served their  
15 FAC, as discovery was concluding, and one business day prior to the parties’  
16 submission of their pretrial papers — to serve an Answer that, among other things,  
17 asserted five new affirmative defenses as to which Plaintiffs have had no discovery.  
18 Further, Phoenix Fibers never moved this Court for an extension of time to file its  
19 Answer to the FAC, because it could not, as it has no good cause for receiving an  
20 extension. Accordingly, Phoenix Fibers’ failure to timely file its Answer is  
21 inexcusable, and its untimely Answer should be stricken.

22 This Motion is made following the conference of counsel pursuant to L.R. 7-3,  
23 which took place on March 15, 2017. This motion is supported by the attached  
24 memorandum of points and authorities, the declaration of Matthew T. Salzmann, all  
25 other files and records in this action, and upon such further showing as may be made  
26 at any hearing that the Court shall convene thereon.

1 Dated: March 22, 2017

ARNOLD & PORTER KAYE SCHOLER LLP

2 By: /s/ Matthew T. Salzmann

3 JOHN C. ULIN

4 ERIC D. MASON

5 LOUIS S. EDERER

MATTHEW T. SALZMANN

6 *Attorneys for Plaintiffs*

7 *Sweet People Apparel, Inc. d/b/a Miss Me*  
8 *and RCRV, Inc. d/b/a Rock Revival*

1                                    **MEMORANDUM OF POINTS AND AUTHORITIES**

2                    This is a breach of contract and trademark infringement case arising out of an  
3 agreement entered into between plaintiffs Sweet People Apparel, Inc. d/b/a Miss Me  
4 and RCRV, Inc. d/b/a Rock Revival (collectively “Plaintiffs”) and defendant Phoenix  
5 Fibers, Inc. (“Phoenix Fibers”) in November 2011. From Plaintiffs’ perspective, the  
6 evidence will show that the parties entered into an agreement whereby Plaintiffs  
7 agreed to deliver their second-quality MISS ME and ROCK REVIVAL brand denim  
8 products to Phoenix Fibers at no cost, and Phoenix Fibers agreed to shred (*i.e.*,  
9 destroy) Plaintiffs’ products and convert them into shoddy fiber. Phoenix Fibers’  
10 commonly-owned affiliate, Bonded Logic, Inc., would then use this shoddy fiber to  
11 manufacture environmentally friendly products such as insulation. The evidence will  
12 further show that Plaintiffs made clear to Phoenix Fibers that such products were  
13 being donated solely for purposes of destruction, because they were not fit for sale in  
14 consumer channels, or use by consumers, due to their poor quality.

15                  Plaintiffs filed and served their First Amended Complaint (the “FAC”) on May  
16 18, 2016, to add two additional parties as defendants. Over the next ten months,  
17 Phoenix Fibers actively participated in all manner of discovery and motion practice,  
18 but failed to file an Answer to the FAC despite being reminded to do so by Plaintiffs’  
19 counsel. As the parties were preparing their pretrial papers some two weeks ago,  
20 however — 289 days after Plaintiffs filed and served the FAC, and just as discovery  
21 was concluding — and without explanation, Phoenix Fibers served an Answer that,  
22 among other things, asserted five new affirmative defenses to Plaintiffs’ claims.  
23 Phoenix Fibers never moved this Court for an extension of time to serve its Answer,  
24 nor has it made any showing of good cause for such an extension, because there is  
25 none. Further, Phoenix Fibers’ assertion of new affirmative defenses at this late stage  
26 of the litigation would be highly prejudicial to Plaintiffs, since they have had no  
27 discovery as to the purported factual basis for these defenses. Accordingly, Phoenix  
28 Fibers’ failure to timely respond to the FAC is inexcusable, and its untimely Answer

1 should be stricken.

2 **I. STATEMENT OF FACTS**

3 Plaintiffs commenced this action on February 10, 2016. Dkt. No. 1.  
4 Thereafter, on March 29, 2016, Phoenix Fibers filed an Answer asserting five  
5 affirmative defenses. Dkt. No. 22. As discovery progressed, however, Plaintiffs  
6 learned of new potential defendants. Accordingly, on May 18, 2016, Plaintiffs filed  
7 and served the FAC, adding two new defendants. Dkt. No. 32.

8 Although Phoenix Fibers did not respond to the FAC, the case continued to  
9 progress, as the parties exchanged discovery materials and conducted depositions  
10 throughout the second half of 2016 and into early 2017. Salzmann Decl. ¶¶ 5–6.  
11 Indeed, at one of those depositions in September 2016, Plaintiffs’ counsel specifically  
12 reminded Phoenix Fibers’ counsel that Phoenix Fibers had not yet filed an Answer to  
13 the FAC, and indicated that it should have done so. Salzmann Decl. ¶¶ 6–8.  
14 Thereafter, in December 2016, Phoenix Fibers filed a motion for summary judgment  
15 (Dkt. No. 84), and more recently, the parties conducted their final depositions leading  
16 up to the discovery cut-off on March 13, 2017. Dkt. No. 80; *see also* Salzmann Decl.  
17 ¶¶ 5, 9. In short, Phoenix Fibers has remained highly active in this case, but still  
18 neglected to file an Answer to Plaintiffs’ FAC for ten months, despite being on  
19 express notice of this deficiency since at least September 2016.

20 Nevertheless, without notice or warning, on March 3, 2017 — 289 days after  
21 Plaintiffs filed and served the FAC, ten days before the close of discovery, and one  
22 business day before the parties’ final pretrial papers were due — Phoenix Fibers  
23 served an Answer to Plaintiffs’ FAC. Dkt. No. 105. Among other things, this  
24 Answer added five new affirmative defenses to the defenses included in its original  
25 Answer: (1) first sale doctrine; (2) statute of limitations; (3) laches; (4) mutual  
26 mistake; and (5) failure to mitigate damages. *Compare* Dkt. No. 105 *with* Dkt. No.  
27 22. And, although the first sale doctrine and mutual mistake arguments were raised  
28 in Phoenix Fibers’ motion for summary judgment (*see* Dkt. No. 84 at 3) — as

1 Phoenix Fibers is sure to mention in its opposition to this motion — the defenses  
2 based on the statutes of limitations, laches, and failure to mitigate had never before  
3 been asserted. Salzmänn Decl. ¶¶ 13–14. Further, Phoenix Fibers neither moved this  
4 Court for an extension of time to file its Answer, nor requested leave to file its  
5 Answer 275 days past its due date.

## 6 **II. ARGUMENT**

7 Under Rule 15(a)(3) of the Federal Rules of Civil Procedure, a party must  
8 answer an amended pleading “within 14 days after service of the amended pleading.”  
9 If this time expires without an answer being filed, however, a Court may extend the  
10 time “for good cause ... on motion ... if the party failed to act because of excusable  
11 neglect.” Fed. R. Civ. P. 6(b)(1)(B). On the other hand, courts may reject without  
12 further consideration belated filings that are made without an accompanying motion  
13 to modify the governing deadline. *See, e.g., Johnson v. Mammoth Recreations, Inc.*,  
14 975 F.2d 604, 610 (9th Cir. 1992) (if a deadline were firm, “the district court could  
15 have denied any late-filed motion solely on that ground, absent a request to modify  
16 the order”); *U.S. Dominator, Inc. v. Factory Ship Robert E. Resoff*, 768 F.2d 1099,  
17 1104 (9th Cir. 1985) (affirming denial of motion as untimely where “defendants  
18 never requested a modification” of the deadline); *Dedge v. Kendrick*, 849 F.2d 1398,  
19 1398 (11th Cir. 1988) (affirming denial of motion as untimely where filed after the  
20 deadline and movant did not request a modification of the deadline); *cf. Patel v.*  
21 *Dameron Hosp.*, 2000 WL 35619441, at \*4 (E.D. Cal. June 23, 2000) (“In their  
22 opposition to defendants’ motion plaintiffs seek an extension pursuant to Rule 6(b)...  
23 [A]fter the expiration of the period the request must be made by formal motion ....  
24 Plaintiffs failed to request an extension of time before the period expired and since  
25 said expiration have failed to bring a formal motion ....”).

26 To the extent it can be said that by filing its Answer, Phoenix Fibers is  
27 implicitly requesting an extension of time, and the Court will not exercise its  
28 discretion to reject the filing outright, Phoenix Fibers still bears the burden of

demonstrating: (a) good cause for granting the motion; and (b) excusable neglect in failing to act within the requisite time frame. *See* Fed. R. Civ. P. 6(b)(1)(B); *In re. Yucca Group, LLC*, 2012 WL 2086485, at \*10 (9th Cir. BAP June 8, 2012); *Friedman v. Albertson's, LLC*, 2015 WL 4606160, at \*2 n.1 (S.D. Cal. July 30, 2015); *Nat'l Corp. Tax Credit Funds II, IV, VI, VII v. Potashnik*, 2009 WL 4049396, at \*\*3–4 (C.D. Cal. Nov. 19, 2009). If a party is unable to demonstrate good cause and excusable neglect — as Phoenix Fibers has made no attempt to do here since there is no possible explanation for its dilatory conduct — then courts routinely strike belated filings, including untimely answers to amended complaints. *See, e.g., Kona Enters., Inc. v. Estate of Bishop ex rel. Peters*, 243 F. App'x 274, 278 (9th Cir. 2007) (finding “no abuse of discretion in striking the untimely exhibits”); *Alvarado v. FedEx Corp.*, 2007 WL 127999, at \*1 (N.D. Cal. Jan. 12, 2007) (striking an untimely answer to an amended complaint); *U.S. v. 242.93 Acres of Land*, 2011 WL 13128803, at \*2 (S.D. Cal. Apr. 8, 2011) (striking an untimely answer); *cf. Potashnik*, 2009 WL 4049396, at \*5 (denying motion for an extension of the time for discovery pursuant to Rule 6(b)(1)(B) where party failed to demonstrate good cause or excusable neglect).

**A. Phoenix Fibers' Answer Should Be Stricken Due to Phoenix Fibers' Failure to Move for an Extension of Time**

Rule 6(b)(1)(B) of the Federal Rules of Civil Procedure requires that, once a deadline has passed, an extension of time may be given only “on motion.” There is no dispute that the deadline for Phoenix Fibers to file its Answer to the FAC passed 275 days before the Answer was filed, yet Phoenix Fibers filed no motion for an extension. Moreover, there is no dispute that Phoenix Fibers was more than capable of moving this Court for an extension of time, as it has already engaged in significant motion practice (both substantive and procedural), and is represented by counsel. In light of the absence of an accompanying Rule 6(b) motion, Phoenix Fibers' Answer should be stricken as untimely without any further consideration. *See Johnson*, 975 F.2d at 610; *U.S. Dominator, Inc.*, 768 F.2d at 1104.

1           **B. Phoenix Fibers’ Answer Should Be Stricken As It Has No Good**  
2           **Cause for an Extension to Be Granted, and Its Neglect In Meeting**  
3           **the Deadline to File Its Answer Is Inexcusable**

4           To the extent that the Court is inclined to consider any argument Phoenix  
5           Fibers may wish to make that it somehow qualifies for an extension under Rule  
6           6(b)(1)(B), the appropriate outcome is clear. Phoenix Fibers does not qualify, as it  
7           cannot demonstrate good cause for such an extension to be granted, nor does it have  
8           any legitimate excuse for neglecting to file its Answer to the FAC within the deadline  
9           set forth in Rule 15(a)(3).

10           **1. There is No Good Cause for an Extension to Be Granted**

11           In a situation where a party has missed a statutory deadline, “good cause”  
12           exists where it could not reasonably have met the deadline despite the diligence of  
13           that party. *See Friedman*, 2015 WL 4606160, at \*\*2–3 (citing cases; discussing  
14           “good cause” in several contexts); *Potashnik*, 2009 WL 4049396, at \*3 (finding no  
15           good cause where party could have complied with the deadline but chose not to so  
16           comply); *see also Stanley v. Huntington Nat’l Bank*, 2012 WL 3570805, at \*5 (4th  
17           Cir. Aug. 21, 2012) (discussing the diligence requirement to show good faith under  
18           Rule 6(b)). On the flipside, a missed deadline resulting from carelessness, belies any  
19           argument of diligence. *See Friedman*, 2015 WL 4606160, at \*2 (citing *Johnson*, 975  
20           F.2d at 609). Moreover, a party’s claim that it diligently attempted to meet a deadline  
21           is undermined by its failure to file a motion pursuant to Rule 6(b). *See In re Dyer*,  
22           330 B.R. 271, 276 (M.D. Fla. Bankr. 2005) (citing *In re Langston*, 319 B.R. 667, 670  
23           (D. Utah 2005)).

24           Phoenix Fibers has not argued — and cannot argue — that it diligently  
25           attempted to meet its deadline to file an Answer to Plaintiffs’ FAC. It does not take  
26           289 days to draft a 21-page Answer. Indeed, Phoenix Fibers still took no action after  
27           it was reminded in September 2016 that it had not yet filed an Answer to the FAC,  
28           waiting another six months before filing, apparently realizing that the case was  
          nearing the pretrial phase, and it might be precluded from asserting these defenses if



1 it failed to file anything. *See* Salzmann Decl. ¶¶ 8, 13. In these circumstances, a  
2 pleading filed on the eve of trial suggests either carelessness or gamesmanship,  
3 neither of which qualifies as good cause for an extension. *See, e.g., Friedman*, 2015  
4 WL 4606160, at \*2. Phoenix Fibers’ lack of good cause is by itself enough to justify  
5 denying an extension and striking the Answer. *See, e.g., Potashnik*, 2009 WL  
6 4049396, at \*3 (“As the Court finds no good cause warranting the granting of the  
7 motion, the Court need not consider Defendants’ claims of excusable neglect.”).

## 8                   **2. Phoenix Fibers’ Neglect Is Inexcusable**

9           To the extent the Court even reaches the point of considering whether Phoenix  
10 Fibers’ neglect is excusable, it should consider the following four factors: “(1) the  
11 danger of prejudice to the opposing party; (2) the length of the delay and its potential  
12 impact on the proceedings; (3) the reason for the delay; and (4) whether the movant  
13 acted in good faith.” *In re Veritas Software Corp. Sec. Litig.*, 496 F.3d 962, 973 (9th  
14 Cir. 2007) (citations omitted). Further, a decision on the issue of excusable neglect is  
15 “committed to the discretion of the district court.” *Id.* In deciding this issue, it  
16 should be emphasized that “[i]nadvertence, ignorance of the rules, or mistakes  
17 construing the rules do not usually constitute excusable neglect.” *Harvest v. Castro*,  
18 531 F.3d 737, 746 (9th Cir. 2008) (citation omitted).

19           Here, the Court is faced with a ten-month, totally unexplained delay, where  
20 Phoenix Fibers is seeking to interpose new (and substantive) affirmative defenses on  
21 the eve of trial. Despite being reminded of missing its filing deadline six months ago,  
22 Phoenix Fibers could not be bothered to file an Answer until two weeks ago. Phoenix  
23 Fibers either purposely filed its Answer ten months late, or simply failed to file its  
24 Answer earlier out of inadvertence. Either of these explanations, however, would cut  
25 against a finding of excusable neglect. *See In re Veritas Software Corp. Sec. Litig.*,  
26 496 F.3d at 973–74; *Harvest*, 531 F.3d at 746–47.

27           Most importantly, Phoenix Fibers’ belated Answer would cause significant  
28 prejudice to Plaintiffs if permitted, as Plaintiffs have had no opportunity to take any

1 discovery with regards to Phoenix Fibers’ new defenses. For example, in September  
2 2016, Plaintiffs conducted the Rule 30(b)(6) deposition of Phoenix Fibers’ President  
3 and CEO Tod Kean. Among the topics of testimony were “[t]he facts, allegations,  
4 denials, and Affirmative Defenses set forth in [Phoenix Fibers’] Answer to the  
5 Complaint and the foundation therefor.” *See* Salzmann Decl. ¶ 7, Ex. 1. Phoenix  
6 Fibers’ delinquent Answer to the FAC has deprived Plaintiffs of the opportunity to  
7 pursue this discovery.<sup>1</sup>

8 The Northern District of California considered very similar circumstances in  
9 *Alvarado v. FedEx Corp.*, 2007 WL 127999 (N.D. Cal. Jan. 12, 2007). The plaintiffs  
10 in that case filed a first amended complaint in 2004. *Id.* at \*1. “Nearly three years  
11 later” and “after extensive motion practice,” the defendant filed an answer that sought  
12 to plead a variety of new affirmative defenses. *Id.* The court thereafter granted the  
13 plaintiffs’ motion to strike the belated answer, finding as follows:

14 [T]he filing of a late answer would prejudice plaintiffs  
15 because of the advanced stage of this litigation. Defendant  
16 states that all of the defenses asserted in the answer have  
17 been raised at some point during this litigation, and thus  
18 plaintiffs will not suffer any harm. If defendant is correct,  
19 the late answer is surplusage and defendant will not be  
20 prejudiced because it has raised those defenses and  
21 preserved them for appeal. However, if defendant has  
22 actually asserted new defenses, as plaintiffs claim, plaintiffs  
23 would be prejudiced by their late assertion.

24 *Id.* The same holding should apply here. Phoenix Fibers’ Answer is either  
25 “surplusage” or highly prejudicial, either of which justifies striking it. *Id.*

26 \* \* \*

27 <sup>1</sup> In an effort to minimize the prejudice to Plaintiffs in the event permits Phoenix Fibers’  
28 untimely Answer to stand, by letter dated March 10, 2017, Plaintiffs requested that Phoenix  
Fibers immediately provide proposed dates for the continuation of Plaintiffs’ Rule 30(b)(6)  
deposition of Tod Kean, so that Plaintiffs could take discovery with respect to “[t]he facts,  
allegations, denials, and Affirmative Defenses set forth in [Phoenix Fibers’] Answer to the  
Complaint and the foundation therefor.” *See* Salzmann Decl. ¶ 16, Ex. 3. To date, Phoenix  
Fibers has not responded to this request. Having had every conceivable opportunity to  
rectify the situation, it should not be permitted to do so now.

1 Accordingly, Phoenix Fibers' untimely Answer should be stricken in view of  
2 Phoenix Fibers' failure (and inability) to demonstrate either good cause for an  
3 extension, or excusable neglect in failing to file the Answer for nine months after it  
4 was due, after having been reminded to do so six months ago. *See, e.g., Kona*  
5 *Enters., Inc.*, 243 F. App'x at 278 (9th Cir. 2007); *Potashnik*, 2009 WL 4049396, at  
6 \*5; *Alvarado*, 2007 WL 127999, at \*1; *242.93 Acres of Land*, 2011 WL 13128803, at  
7 \*2.

### 8 **III. CONCLUSION**

9 For all the foregoing reasons, Plaintiffs respectfully request that the Court enter  
10 an order striking Phoenix Fibers' Answer to Plaintiffs' FAC.

11 Dated: March 22, 2017

ARNOLD & PORTER KAYE SCHOLER LLP

12 By: /s/ Matthew T. Salzmann

13 JOHN C. ULIN

14 ERIC D. MASON

LOUIS S. EDERER

15 MATTHEW T. SALZMANN

16 *Attorneys for Plaintiffs*

1 **CERTIFICATE OF SERVICE**

2 I am over eighteen years of age and not a party to this action. I am employed  
3 in the New York County, State of New York. My Business Address is 250 West 55th  
4 St., New York, New York 10019.

5 On March 22, 2017, I served the following documents described as  
6 **PLAINTIFFS' NOTICE OF MOTION AND MOTION TO STRIKE PHOENIX**  
7 **FIBERS, INC.'S ANSWER TO PLAINTIFFS' FIRST AMENDED**  
8 **COMPLAINT; DECLARATION OF MATTHEW T. SALZMANN IN**  
9 **SUPPORT OF PLAINTIFFS' MOTION TO STRIKE PHOENIX FIBERS,**  
10 **INC.'S ANSWER TO PLAINTIFFS' FIRST AMENDED COMPLAINT; and**  
11 **[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION TO STRIKE**  
12 **PHOENIX FIBERS, INC.'S ANSWER TO PLAINTIFFS' FIRST AMENDED**  
13 **COMPLAINT** on the following individuals:

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15 Kenneth G. Parker  
16 Martin M. Ellison  
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Dated: 3/22/2017

/s/ Matthew T. Salzmann

Matthew T. Salzmann